

Competition policy and law enforcement in Botswana, Nigeria and Ethiopia: identifying drivers for reform

Article (Accepted Version)

Dawar, Kamala and Ndaba, Ndлуvo (2017) Competition policy and law enforcement in Botswana, Nigeria and Ethiopia: identifying drivers for reform. *Journal of Antitrust Enforcement*, 5 (2). pp. 161-162. ISSN 2050-0688

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/67083/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

**A Comparative Assessment of Competition in Africa:
Identifying Drivers of Reform in Botswana, Ethiopia and Nigeria**

Kamala Dawar and Ndaba Nlova¹
Revised for Resubmission 9/9/2017
[redacted]

JEL Code: K21 Antitrust Law

Keywords: Competition, Anti-trust, Africa, Botswana, Nigeria, Ethiopia, COMESA, ECOWAS, SADC

Abstract

This paper undertakes a comparative assessment of the development of competition in Botswana, Ethiopia and Nigeria. These three African countries have all sought to introduce domestic competition law since 2000. The paper identifies the different factors that have contributed to the relative success in introducing competition law in Botswana, as compared to both the Nigerian and Ethiopian experience. The paper highlights the significance of both domestic and external factors in nurturing competition and good economic governance. It concludes that effective enforcement of competition law is founded on both internal and international dynamics. While domestic will for competition is a necessary precondition, the case of Botswana indicates how domestic reforms needed to be buttressed by capacity building and expertise from external sources, for the betterment of markets, producers and consumers.

1. Introduction:

While the importance of anti-trust or competition has been acknowledged for centuries,¹ in many developing and transition economies, competition law is still a recent innovation. Although many developing countries have been undertaking economic reforms towards market liberalization and privatisation, their efforts have oftentimes been undermined by either the lack of competition laws and policy aimed at regulating economic behaviour and structures for the benefit of the whole economy and society – producers and consumer; or where competition policy and law exists – lack of political will and experience to implement and enforce it.²

Yet resource rich, developing countries are particularly prone to distorted market incentives and regulatory capture because government institutions are typically less developed and the temptations are strong. If no safeguards exist to prevent anti-competitive practices, firms can abuse their dominant market position through predatory behaviour to eliminate local competition, or through forming cartels and other market-sharing agreements.³ Such anti-competitive behaviour functions to reduce choice, increases prices and generally denies consumers and other excluded producers the benefits of trade liberalization. This has an even more detrimental impact when the majority of the population live in conditions of relative poverty.

¹ The authors are indebted to the valuable insights of Thula Kaira, George Lipimile and the anonymous referees and editors at the JAE. All errors remain the authors.

² Fox, Eleanor M., *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries* (October 1, 2012). *Competition Policy and Regional Integration in Developing Countries*, Josef Drexler, Mor Bakhoum, Eleanor M. Fox, Michal Gal and David Gerber, eds. (Elgar 2012); NYU Law and Economics Research Paper No. 11-04. Available at SSRN: <https://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

³ See R. A. Posner, 'The Social Costs of Monopoly and Regulation' (1975) 83 *Journal of Political Economy* 807; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 105; G. Amato, *Antitrust and the Bounds of Power* (Oxford, Hart, 1997) ch. 7.

This paper compares and contrasts the efforts to develop competition policy and law in three African countries – Botswana, Ethiopia and Nigeria – since 2000. Such a comparative approach is of value to identify both external and internal drivers that can and have been harnessed to establish competition regimes and overcome misguided policies or corrupt self-interest in the status quo. This comparative approach also offers insight into the different roles played by regional agreements in Africa, and how they can potentially support domestic reforms. Successive African Union decisions have fuelled this regionalising dynamic, in seeking to expedite regional economic integration with a view to forming a Continental Free Trade Area (CFTA) by 2017, an economic union by 2019. The ultimate goal is to achieve full political and economic integration leading to the United States of Africa.⁴

Effective and compatible laws promoting cooperation in implementing and enforcing competition will be an important component of African economic integration, for preventing firms from undermining the benefits of continent wide markets for African consumers and producers. This examination is therefore undertaken with the ultimate goal of identifying forces that can propel the creation of a competitive and vibrant African economy that protects consumers and producers from unfair and uncompetitive business practices.

2. Background

Competition policy concerns arose in Botswana less than two decades ago. In 2001, an economic mapping survey was conducted in response to rising levels of unemployment and stagnant growth. The survey report highlighted increasing anti-competitive dominance of foreign firms, with potential to undermine any wider economic reforms. This led to the development of a national competition policy, which was passed by Parliament in 2005.⁵ The Botswana National Competition Policy provided a coherent framework to integrate privatisation, deregulation, and liberalisation of trade and investment, which led to the establishment of the 2009 Competition Act. The Act created a Competition Authority and Competition Commission to enforce and promote it.⁶ Since then, competition policy and law enforcement in Botswana has progressed at a faster pace than regionally – under the Southern African Development Community (SADC) trade agreement. Botswana ranked at 71 in the World Economic Forum Competitiveness Rankings and 35 out of 176 countries in the Transparency International Corruption Perceptions Index 2016.⁷

In Nigeria, concerns about anti-competitive practices undermining economic development led to the drafting of a Federal Competition Bill in 2002. This Bill sought to establish a Federal Competition Commission to prohibit restrictive contracts and business practices. However, this Bill was not enacted, along with a total of nine bills that have been presented at the National Assembly in a bid to create a legal framework for competition in Nigeria. More recently, a Bill For An Act To Provide For The Establishment Of The Nigerian Trade And Competition Commission And For Other Matters Connected Therewith” (NTCC Bill) in 2012 was presented to the upper legislative house, and also saw no significant enactment progress.⁸ The lack of competition in any economy contributes to a reduction in consumer welfare, higher prices, with less choice, innovation and market dynamism; it also provides fertile ground for

⁴ African Union, 2005c:Assembly/AU/Dec.90(V), §3; Murithi 2008. See: African Continental Free Trade Area: Advancing Pan-African Integration. Some Considerations. UNCTAD, Geneva 2016. Available at: http://unctad.org/en/PublicationsLibrary/webdite2016d5_en.pdf

⁵ The Botswana Competition Policy. Ministry of Trade and Industry. 2005. Downloaded 8/9/2017 from: www.competitionauthority.co.bw/sites/default/files/National%20Competition%20Policy%20Botswana%202005.pdf

⁶ Botswana Competition Act 2009 Part II, paras 4,5. Downloaded 8/9/2017 from: www.wipo.int/edocs/lexdocs/laws/en/bw/bw009en.pdf

⁷ Downloaded 8/9/2017 from www.transparency.org/country/BWA

⁸ Temiloluwa Osinowo argues that this repeated failure to enact a competition law is due to insufficient understanding of the nature and essence of the issue among politicians. T. Osinowo. *Competition law in Nigeria*. This day newspaper October 21, 2014. Downloaded 8/9/2017 from: www.vitaveritasllp.com/competition-law-in-nigeria/

cartels, bid rigging and corruption.⁹ Nigeria's World Bank 2015-6 Competitive Index was 124, and ranked for the second year at 136 out of 176 countries on the Transparency International Corruption Perception Index 2015, alongside Russia and Kirgizstan.¹⁰

Somewhere in between these two experiences lies the case of Ethiopia, which despite adopting a free market economic policy in 1991, did not draft the Trade Practice Proclamation until 2003. While the Proclamation sought to secure fair competitive process through prevention and elimination of anti-competitive and unfair trade practice, and to safeguard the interest of consumers,¹¹ it lacked comprehensive and targeted consumer protection provisions. This was addressed in the follow-up 2010 Proclamation,¹² which established a new government agency - the Trade Practices and Consumers' Protection Authority (TPCPA). The TPCPA was endowed with judicial functions, including imposing administrative measures, civil sanctions and compensations for consumers. This Proclamation was further amended in March 2014, comprehensively addressing anti-competitive practices and consumer protection. Yet the effective implementation and enforcement of this most recent Proclamation, based for the most part on international best practice, has not yet been forthcoming.¹³ This is reflected in Ethiopia's World Economic Forum Competitive Ranking of 109 in 2015/16,¹⁴ and corruption perception ranking of 108 out of 176 countries.¹⁵

The paper seeks through comparing the past 17 years in three African countries' efforts to develop competition law and policy, to identify best domestic and external that can stimulate the necessary *will* to enforce competition policy and law. The paper concludes that the successful experience of Botswana highlights that the general awareness of the importance of competition and good economic governance for consumers and producers initiated by a few individuals in the political and public arena, was supported by external factors, most notably utilising international expertise, cooperation and capacity building programmes. Even when the necessary domestic will is available, sustaining an effective domestic competition law also requires external drivers for reform. Domestic advocates for competition in Africa, should therefore buttress their efforts by harnessing external factors to drive competition reforms. These include not only international development agencies, most notably in this case UNCTAD, but also increasingly African regional initiatives in the form of the Continental Free Trade Agreement and the Tripartite Free Trade Agreement (TFTA) launched in June 2015, between COMESA, the East African Community (EAC) and the Southern African Development Community (SADC), as well as the African Competition Forum (AFC).

3. Introducing Competition in Botswana: another African success story

An assessment of the development of competition policy and law in Botswana indicates that while the necessary will to implement competition policy has existed domestically, external factors have continually been harnessed where necessary. Although competition policy discussions can be traced back to 1997,¹⁶ it

⁹ Evenett, Simon J.; Levenstein, Margaret C.; and Suslow, Valerie Y., "International Cartel Enforcement: Lessons from the 1990s" (2001). Economics Department Working Paper Series. 89.

www.scholarworks.umass.edu/econ_workingpaper/89

See for example: www.businesslive.co.za/bd/business-and-economy/2016-10-06-lack-of-competition-in-sa-enables-cartel-conduct/; Or the National Stakeholders meeting on competition issues 'Nigeria disadvantaged due to no competition law'. (23rd September 2008).

¹⁰ http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table

¹¹ Article 3 The Trade Practice Proclamation, No.329, 2003, *Federal Negarit Gazeta*, 9th Year No.49.

¹² Proclamation No 685/2010.

¹³ UNCTAD is implementing a competition law enforcement capacity building programme in Ethiopia under funding from the Duchy of Luxembourg.

¹⁴ World Economic Forum <http://reports.weforum.org/global-competitiveness-report-2015-2016/competitiveness-rankings/>

¹⁵ http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table

¹⁶ <http://dspace.africaportal.org/jspui/bitstream/123456789/32799/1/Competition,%20Productivity%20and%20Privatisation.pdf> Competition, Productivity and Privatisation by Abdalla Gergis, BIDPA Paper number 13/1997.

Botswana public policy makers, private sector and other African leaders from the Commonwealth shared experiences on public sector reform. This seminar was attended by all Botswana government ministries, heads of parastatals, BOCCIM, Botswana Chamber of Commerce, Trade Unions, Head of Commonwealth.

was not until a 2002 economic mapping survey report that reforms were initiated. UNCTAD was requested to support these reform initiatives, guiding the drafting of the economic mapping.¹⁷ This report revealed, among other things, that market dominance and substantial market power in some sectors where tendering for public procurement could be open to collusion amongst bidders in their respective markets.¹⁸ It further indicated that franchising and distance selling tended to exclude local firms. Regulation of market entry constituted obstacles to competition in some sectors such as utilities and telecommunications.¹⁹

The Legislative Inventory of Botswana Laws Relevant for a Competition Policy ultimately concluded that almost every piece of legislation relating to or affecting business activity had some bearing or impact on competition in that legislation and regulation hindered competition in the market hence the need for reform.²⁰ The 2005 National Development Plan subsequently put forward the objectives of the Botswana government's Vision of 2016 as the diversification²¹ of the economy and improved productivity.²² This Plan was the result of more than three years of consultation and advocacy involving both internal and external stakeholders to develop a policy.²³

Over the next five years UNCTAD capacity building support guided the drafting of the competition policy, competition law, as well as awareness raising among Government and the private sector. It is heartening, in 2017, to see that Botswana's Vision has been realised. It indicates the success of a comprehensive approach to develop a competition framework, from economic mapping, legislative inventory, policy and then law is possible. Although open to criticism from the private sector that the process took too long, the depth of this process and its inclusiveness grounded competition principles into the macro economic framework and made it easier for competition law enforcement to take root.

3.1 Botswana competition policy and law

The 2005 Botswana Competition Policy was promulgated to provide a framework designed to prevent and redress anticompetitive practices and conduct by firms and to create a business-friendly environment that encourages competition and efficient use of resources. The theory was that competition would promote investment and innovation, broaden choices for consumers, reduce monopoly rents and consumer prices and raise the quality of goods and services produced.²⁴ The rationale for Botswana's competition policy lay in the need to maximise the benefits of trade and investment liberalisation, deregulation, privatisation while protecting the benefits generated by competition from erosion by anticompetitive practices in a deregulated environment. The Policy also aimed to address problems related to the globalisation of cartels, abuse of market dominance and monopolisation of key sectors following the opening up of markets and the significant increase in cross-border trade, as well as investment flows.²⁵

Pursuant to these policy objectives, the Competition Act of Botswana was enacted in 2009. The Act provides for the establishment of the Competition Authority, its mandate, the regulation of competition in the economy, and matters incidental thereto. The Act is administered by the Competition Authority (CA).

¹⁷ This work was done under the UNDP country programme for Botswana with UNCTAD as the implementing agency.

¹⁸ Para 2.2 National Competition Policy for Botswana Ministry of Trade and Industry July, 2005, Gaborone, Botswana. www.mti.gov.bw/webfm_sen. Market dominance in the meat industry, the cement industry, the sugar industry, beverages, mining and the motor vehicle distribution sectors was unearthed.

¹⁹ Ibid Para 2.4 For example, Section 4 of the Electricity Supply Act (CAP 73:01) gave precedence to the interests of the Botswana Power Corporation.

http://www.cuts-international.org/7up3/Botswana_CRR.pdf p.12

²⁰ Ibid Para 2.6 Therefore, the envisaged formulation of the Competition Law would take cognizance of this fact.

²¹ www.un.org/jsummit/html/prep_process/national_reports UN Country profile. See

Botswana National Development Planning NDP8 p.17 "The aims of this policy are two-fold – to boost employment and to reduce the country's risk of depending too heavily on a single commodity."

²² <http://planipolis.iiep.unesco.org/upload/Botswana/Botswana%20EFA%20NPA.pdf> also Bidpa Paper 13/1997 page 11.

²³ http://www.cuts-international.org/7up3/Botswana_CRR.pdf Preliminary Draft Report Competition Issues in Botswana. Monnane M Monnane. Botswana Institute for Development Analysis.

²⁴ Para 1.2

²⁵ Para 1.1 http://www.mti.gov.bw/webfm_sen

This is a statutory corporate body set up under the terms of section 4 of the Act, clothed with the legal powers and authority to carry out the functions specified in terms of section 5 of the Act.²⁶ Section 5 broadly sets out the powers of the CA “for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market”²⁷ The CA is also empowered inter-alia to make rules for fair and transparent business practices, publicise such,²⁸ regulate mergers²⁹, educate the public about its functions³⁰ and to advise the government on potential or actual anti-competitive practices.³¹ One important function is to liaise “with and exchange information, knowledge and expertise with authorities entrusted with functions similar to those of the Authority, in other countries.”³² The CA investigates³³ any breaches of the Act and prosecutes³⁴ such breaches before the Competition Commission. The CA is headed by a CEO appointed by the Minister on recommendations of the Commission. The CEO holds office for a period of 5 years and the first CEO was an international expert, when it was evident that a domestic candidate with the necessary skill-set was not available in Botswana.³⁵

The Act also establishes a Competition Commission in terms of section 9 “which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority.”³⁶ Among its other duties, the Commission of seven officials appointed by the Minister from experts in commerce, industry, economics, law, commerce, public administration,³⁷ is empowered to adjudicate on matters brought before it by the Authority and to give general policy direction to the Authority.³⁸ Control of restrictive agreements and dominant position is in part V which covers prohibited practices such as horizontal agreements,³⁹ vertical agreements,⁴⁰ and other vertical agreements,⁴¹ thresholds for determining prohibition,⁴² interconnected enterprises⁴³ and dominant position.⁴⁴ These practices are prohibited per se, as they hinder competition and violate the Act. However, a trading enterprise can escape penalties even if it has violated the act. But this is only if the investigating authority reasonably expects that there will be offsetting benefits for the public directly attributable to the agreement.⁴⁵ Under PART VI — *Exemptions and assessment criteria paragraph 32 provides, inter alia, that* where the Authority finds, on investigation that an agreement other than a horizontal agreement or a vertical agreement prohibited by section 25 and section 26 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 34,

²⁶ Sec 4 COMPETITION ACT, No. 17 of 2009

<http://www.competitionauthority.co.bw/sites/default/files/Competition%20Act%202009.pdf>

²⁷ Sec 5(1)

²⁸ Ibid 5(2) (a)

²⁹ Ibid (b)

³⁰ See note 17 supra (d)

³¹ Ibid 5(e) and 5(f)

³² Ibid 5(i)

³³ 5 k

³⁴ 5 p

³⁵ Until 2011, Mr Thula Kaira was the CEO of the Zambian Competition Authority, where he worked for 11 years.

³⁶ Sec 9

³⁷ Sec 10

³⁸ Sec 9(2)

³⁹ Sec 25, horizontal agreement means an agreement between enterprises each of which operates, for the purpose of the agreement, in the same market and would therefore normally be actual or potential competitors in that market;

⁴⁰ Sec 26, vertical agreements are agreements between enterprises each of which operates, for the purposes of the agreement, at a different level of the production chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

⁴¹ Sec 27 “... if, following an investigation by the Authority, such agreement is found to have the object or effect of preventing or substantially lessening competition in a market for any goods or services in Botswana”.

⁴² Sec 28

⁴³ Sec 29 (3) For the purposes of this section, bodies corporate are inter-connected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

⁴⁴ Sec 30- Dominant position means a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors

⁴⁵ Sec 32.

grant an exemption from the prohibition if it can be reasonably expected that there will be offsetting benefits for the public directly attributable to the agreement in the form of —

- (a) the maintenance of lower prices, higher quality or greater choice for consumers;
- (b) the promotion or maintenance of the efficient production, distribution or provision of goods and services;
- (c) the promotion of technical or economic progress in the production, distribution or provision of goods and services;
- (d) the maintenance or promotion of exports from Botswana or employment in Botswana;
- (e) the strategic or national interest of Botswana in relation to a particular economic activity being advanced;
- (f) the provision of social benefits which outweigh the effects on competition;
- (g) the agreement occurring within the context of a citizen empowerment initiative of Government; or
- (h) the agreement in any other way enhancing the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation:

Provided that the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprises concerned to eliminate competition completely in respect of a substantial part of the products or services in question. [Emphasis added]

The Botswana Competition Policy of 2005 explicitly excludes from the ambit of the Competition Law,⁴⁶ inter alia, Public Utilities and Intellectual Property Rights:

1. The provision of infrastructural facilities for public utilities such as land-line telecommunications, water, and electricity require huge capital outlays, which take long to recoup given the paucity of Botswana's population and the resultant small market base. Since this situation may constrain private sector investment in this sub-sector, Government may exclude and exempt the provision of some of the infrastructural facilities from this Policy.
2. The aforementioned exclusions and exemptions notwithstanding, Government may include the provision of services such as public utility connections and distribution services within the ambit of this Policy.

The Policy further recognises the important role intellectual property (patents, trade marks and copyrights) plays in Botswana's human and economic development endeavours and the need to protect and safeguard the interests of intellectual property rights-holders. Therefore, as a way of protecting intellectual property rights from infringement and to promote the development of creations and innovations, intellectual property rights will be exempted and excluded from the ambit of this Policy. Exceptions and exemptions to competition rules imply, prima facie, the benefits of competition and liberalising the economy can be blocked by these exceptions and exemptions. One such example is in the provision of energy by BPC. Despite building a new Power Plant at Morupule B, the plant has failed to produce 600MW of electricity since its completion in 2014. About 300MW have been produced resulting in massive power shortages. As a result, Botswana has continued to import electricity from ESKOM of South Africa at a further cost to the taxpayer.⁴⁷ This is inefficient. A new Morepule B phase 11 Project for 600 MW is now under tender. Many SOEs are not performing well and several, including the Botswana Meat Commission, the Botswana Telecommunications Corporation (BTC) and the Botswana Development Corporation, have been embroiled in scandals involving alleged fraud and mismanagement.⁴⁸

⁴⁶ 2005 Competition Policy (I)(ii)

www.competitionauthority.co.bw/sites/default/files/National%20Competition%20Policy%20Botswana%202005.pdf

⁴⁷ <http://www.mmegi.bw/index.php?aid=41662> [accessed 17/08/15]

⁴⁸ One former CEO and several employees of the BTC were indicted on corruption charges in 2012. <http://www.state.gov/e/eb/rls/othr/ics/2013/204607.htm>

3.2 Application of the Act: Success is in the climbing

Working in collaboration through an MoU signed with the CA, Directorate on Corruption and Economic Crime (DCEC), and the Public Procurement Asset Disposal Board (PPADB), the Competition Authority CA's has implemented its enforcement and advocacy powers under Section 5 of the Competition Act, to ensure that suspicious transactions and relevant information is exchanged. As a result of this MoU, the CA has more effectively intervened to remove anti-competitive conduct in the market including refusal to deal and removing barriers to entry in several cases involving the supply of sugar, explosives and physiotherapy equipment and fly ash.⁴⁹ The Cement Market Inquiry, for example, uncovered an exclusive agreement between Botswana Power Corporation through Morupule Power Station, and one cement player PPC Botswana. A market enquiry was conducted under the auspices of an established external structure - the African Competition Forum - in collaboration with Botswana's domestic Competition Authority, the DCEC and the PPADB. The investigation concluded that the fly ash at Morupule Power Station was given on a contractual basis making it difficult for other cement players to source it.⁵⁰ The Authority established that this agreement was exclusive and anti-competitive in nature, as it created a barrier to access raw material (essential input). The duration of the agreement was over a period of 10 years, renewable every five years wherein PPC Botswana was the sole beneficiary of the fly ash while other players were forced to find alternate sources. Following the CA's intervention, the agreement was terminated hence lifting barriers to the access of fly ash by other players.⁵¹

A total of 61 cases of anti-competitive conduct were handled by the Authority during the 2013/14 review period. Out of these cases, 28 were brought forward from 2012/13, while 33 were new cases received during 2013/14. During the period under review, 25 cases were closed without referral to the Competition Commission, while six out of 19 reported cases involving cartels were referred to the Commission. There were no cases referred to the Commission for resale price maintenance or on abuse of dominance despite 36 cases handled. In one case of abuse of dominance by an anchor tenant at Molapo Crossing Shopping Mall, the CA intervened and the matter was resolved without a referral. A total of 34 cases were carried forward to the 2014/15 financial year as investigations were still on-going in December 2015.⁵²

On bid rigging, the CA on 29th July 2013 received a complaint from a whistle blower concerning the awarding of a tender valued at 114million Pula to supply 1 500 000 units of infant milk formula in 400 grams' cans to the Ministry of Health. The CA then initiated an inquiry to substantiate the allegations of bid rigging for the tender. Following analysis of the individual bids, the Authority had reasonable grounds to suspect that Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd had engaged in collusive tendering. The Authority then decided to investigate the matter and referred it to the Tribunal for adjudication following the conclusion of investigations.⁵³

⁴⁹ www.competitionauthority.co.bw/sites/default/files/CA%20market%20studies%20press%20statement%2013%2005%2014.pdf

⁵⁰ Fly ash is one of the residues generated by coal combustion and is used in the cement industry as an additive in the cement manufacturing process.

⁵¹ Botswana Competition Bulletin. Issue 3. 2015. See: www.competitionauthority.co.bw/sites/default/files/Botswana%20Competition%20Bulletin%20Issue%203%20Volume%203.pdf

⁵² www.competitionauthority.co.bw/sites/default/files/Annual%20Report%202013-14-2.pdf p23

⁵³ *ibid*, p. 3 On the 2nd July 2015 the Competition Commission (Tribunal) sat to hear the matter between the Competition Authority and Rabbit Group and Creative Business Solutions concerning alleged bid-rigging of an infant milk formula tender worth P114 million. The Respondents Rabbit Group and Creative Business Solutions had raised preliminary points of law and argued that the complaint brought by the Competition Authority was not cognizable and that the Commission had no jurisdiction over the matter. They further argued that the complaint was referred to the Commission after the mandatory one year period. The Authority on the other hand argued that on a proper interpretation of the Competition Act, and taking all the circumstances into their proper perspective, the complaint was brought within the said one year statutory timeframe, and that the Commission had jurisdiction over the matter. After hearing the arguments from both parties, the Tribunal adjourned and reserved its ruling.

On mergers, the CA made determinations on 33 proposed mergers against a target of 25; thus, 32% above target in 2013/14.⁵⁴ Out of the 33 merger cases that were determined in 2013/14, the Authority approved 18 without conditions and 15 with conditions.⁵⁵ No merger case was prohibited, as substantial lessening of competition, dominance and public interest concerns were addressed with appropriate remedies and conditions. While there have been numerous successes concerns have been raised that public interest considerations take precedence with the Authority emphasising local priorities, particularly the increasing levels of unemployment in Botswana, and public interest considerations have been a key part of the Authority's decisions even where no competition concerns are raised.⁵⁶ In 2012, 10 of the Authority's 17 publicly available merger decisions, either (i) imposed a condition that no job losses would occur as a result of the transaction, or (ii) include a commitment by the parties that no retrenchments or redundancies would occur as a result of the merger.⁵⁷

In January 2013, the Competition Authority prohibited the proposed merger between Medical Rescue International Botswana Limited (MRIB) and Botswana Medical Aid (BOMAID), which already held a majority share in MRIB. The Authority found that the transaction would not lead to the substantial lessening of competition in health care administration, emergency medical, call centre services and on-site medical clinics in Botswana, but rejected the merger on public interest grounds, holding that instead of selling more shares to BOMAID, MRIB should divest these shares to "other citizens."⁵⁸ Bomaaid appealed to the Commission.⁵⁹ Critics argued that the CA was not applying the Act in a balanced way.⁶⁰ The public interest approach taken here was similar to that of South African Competition Law.⁶¹ Limits to the role of

⁵⁴ <http://www.competitionauthority.co.bw/sites/default/files/Annual%20Report%202013-14-2.pdf> p 32

⁵⁵ See Annual Report supra at page 32.

⁵⁶ <http://www.bowman.co.za/News-Blog/Blog/Competition-Law-in-Botswana>

In terms of section 59(1) of the Act, "[i]n assessing a proposed merger, the Authority shall first determine whether the merger (a) would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or (b) would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market" (my emphasis). Despite public interest considerations appearing secondary to the effect on competition in merger control assessment, the Authority's decisions to date afford public interest considerations a prominent role in merger review, possibly losing focus of the objective of the Act as competition legislation, first and foremost.

⁵⁷ *ibid*

⁵⁸ *Ibid*. The decision seeks to ensure that more local citizens are economically empowered and that wealth is distributed amongst the country's citizens

⁵⁹ *Ibid*. Following a request from BOMAID, the Commission determined that it has the power to hear appeals against merger decisions of the Authority and agreed to hear an appeal against the prohibition, the first merger appeal in Botswana. As at the time of writing, the Commission has not heard the appeal.

⁶⁰ *Ibid* <http://www.nortonrosefulbright.com/files/competition-world-newsletter-january-2013-74736.pdf> it would be helpful for the Commission to balance the consideration of public interest factors with the determination of the effect of a merger on competition to ensure that the Act is applied with the objective of improving competition in the country's economy In a press statement, the Authority noted that "since BOMAID is already in possession of majority shares in MRI Botswana, the shares currently held by CEDA Venture Capital Fund Limited should be sold to other citizens who are not already part of MRI Botswana. This is meant to ensure that more citizens are economically empowered and wealth is distributed amongst other citizens. The Authority is of the view that the parties to the transaction should seek other alternative citizen buyers to acquire the shares owned by CEDA Venture Capital Fund Limited". Practical implications. Through these decisions, which are appealable to the High Court of Botswana, the Authority places much weight on citizen empowerment initiatives when assessing transactions in Botswana and it would therefore be wise or foreign parties to prepare, in addition to a comprehensive competition analysis, equally weighty countervailing public interest arguments indicating the benefits that the transaction would have upon the broader public interest in that country.

⁶¹ <http://www.nortonrosefulbright.com/files/competition-world-newsletter-january-2013-74> pp 18. The merger control provisions in South Africa's Competition Act require the Competition Commission to investigate not only whether a proposed transaction will result in a substantial lessening or prevention of competition in South Africa, but also whether it will impact negatively on various "public interest" matters. These "public interest" matters are the effect that the merger will have on: employment or a particular industrial sector or region; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets.

“public interest” considerations in South African merger control is spelt out in the Wal-Mart/Massmart case.⁶²

This case highlights the importance for domestic competition authorities to have a regional approach. The successes of the CA have resulted in the government proposing that the Consumer Protection (which has seen no prosecution since inception) should be administered by the Competition Commission. In 2002, in a speech to parliament, the Minister of Finance stated the objectives of NDP 9 as “towards realisation of Vision 2016” and achieving “sustainable and diversified development through competitiveness in global market” Growth of non-mining sectors which grew at 7% compared to 5% for mining and saw mining contributions to GDP reduced from 34.4% to 31.8%.⁶³ These projections also revealed that the share of the non-mining, excluding Government value added, will dominate GDP at 74.7 %, 76.3 % and 77.8 % in 2013/14, 2014/15 and 2015/16, respectively.⁶⁴ Therefore, foundations for the role of the CA preceded the creation of the CA as government strove to create a market structured economy through privatisation policies and laws such as the Privatisation Policy for Botswana and the International Financial Services Centre.

3.3 Challenges / Weaknesses

Despite the enormous strides taking place within the Botswana CA, some established monopolies owned by the powerful established elite in Botswana persist, such as in the field of day old chicks.⁶⁵ The poultry meat industry in the region was found to be oligopolistic in nature with many of the same large firms operating at varying levels in four different countries.⁶⁶ The development of the poultry industry in Botswana was an import substitution measure protected by government legislation, which in prohibiting

⁶² Ibid. Parties undertaking a merger in South Africa should, at an early stage of planning their transactions, give proper consideration to whether their transaction may lead to job losses or changes to workers’ conditions of employment. If necessary, they should tender appropriate conditions which address any negative effects on the public interest, particularly if expedited clearance is required.

⁶³ http://www.sarprn.org/documents/d0000257/P248_Development_Plan9.pdf p 3. Draft National Development Plan 9 2003/04 – 2008/09 Minister of Finance and Development Planning Delivered to The National Assembly on the 21st November 2002. NDP 9 (2004-2009) objective of moving “towards realisation of Vision 2016” and achieving “sustainable and diversified development through competitiveness in global markets”. p 27.

⁶⁴ [http://www.undp.org/content/dam/botswana/docs/Publications/Botswana .pdf](http://www.undp.org/content/dam/botswana/docs/Publications/Botswana.pdf) Mid-Term Review of NDP 10 The Mining sector’s share of GDP will decrease from 15.1 percent in 2009/10 to 11.6 percent in 2015/16. Government contribution to GDP will decrease from 13.8 percent in 2009/10 to 10.6 percent by the end of the Plan.

³¹ For the remaining years of NDP 10, a three-pronged strategy seeks to: Create a Private sector enabling and supportive policy environment; Stimulate increased domestic and foreign private investment; and Enhance competitiveness in both goods and services markets. p. 5.

⁶⁵ Competitiveness can never happen if farmers here cannot have access to competitively priced inputs like feed and Day Old Chicks by Professor Roman Grynberg.- See more at: <http://www.mmegi.bw/index.php?sid=6&aid=33&dir=2012/february/friday24#sthash.oyea9aRV.dpuf> accessed 12 /08/2015

⁶⁶ <http://www.competitionauthority.co.bw/sites/default/files/Botswana%20Competition%20Bulletin%20Issue%202%20Volume%202.pdf> accessed 12/08/15 With regard to Botswana, the market study revealed that the poultry meat industry is unique with complex ownership structures. The largest producers in Botswana have ties to South African producers, the largest domestic producers face limited competition at the breeder and processing levels, and the tight trade restrictions protect the dominant players from competition. The research report further states that in Botswana (and Zambia), there is a general observation that dominant companies could be engaging in unilateral conduct bordering on over-pricing of poultry products at both feed and broiler breeding levels.

imports de facto created a statutory monopoly.⁶⁷ Based on SA prices the economic loss to domestic consumers is estimated to be Botswana Pula 615 million per annum.⁶⁸

Where issues of capacity have been a challenge, Botswana has been open to harnessing external resources. From the outset, the CA did not have staff experienced to deal with complex matters. The first CEO was brought in from the Zambia Competition Authority;⁶⁹ experienced Counsel are hired from SA at a great cost to the CA, and staff are provided with continuous training and development. In the application of the Competition Act, various legal challenges have faced the CA as Defendants have raised various loopholes in the Competition Act to avoid prosecution or penalties.⁷⁰ This has required amendments to the Competition Act, such as separating the Competition Commission's judicial function from its prosecutorial function by establishing a Competition Tribunal separate from the Commission to prosecute the offenders.

4. Competition in Nigeria – identifying for drivers for reform

Unlike Botswana, a competition law has never operated in Nigeria, despite the many initiatives to adopt and implement competition law legislation. Yet it was at about the same time as in Botswana that initiatives began, such as the drafting of a Nigerian Federal Competition bill with the aim of establishing a Federal Competition Commission. This was with a view to prohibiting restrictive contracts and business practices that substantially lessen competition, as well as regulating the abuse of dominant position of market power and anticompetitive business. A bill sponsored by the Federal Government through the bureau of Public Enterprise (BPE) was presented as an executive bill to the Nigerian Senate in 2002. However, there was no further actions on the bill since its presentation stage.

In 2008, another bill was drafted for an Act to provide for the establishment of the Nigerian Trade and Competition Commission.⁷¹ This draft Nigerian law set forth the rules applicable to the regulation of mergers and acquisitions (M&A) and a right to an appellate review (in a court of law) of all final decisions laid down by the Nigerian Competition Commission's dispute resolution bodies. The Federal Competition Bill further introduces the regulation of anti-competitive practices into Nigerian law. The Bill serves to prohibit conduct, whether by contract, arrangement or other understanding, which has the effect of restricting trade or substantially lessening competition. Conduct specifically prohibited in terms of the Act includes: restricting output or production, price fixing, market division, collusive tendering, and denial of access to a market or to an input for production. The Bill further introduces restrictions on the activities of

⁶⁷<http://www.compcom.co.za/wp-content/uploads/2014/09/GrynbergMotswapong.pdf> Competition and Trade Policy. Professor Roman Grynberg and Mr Masedi Motswapong: The Case of the Botswana Poultry Industry. p 7. While the poultry industry or other similar import substituting sectors cannot be seen as a statutory monopoly as is the case of infrastructure providers, such as Botswana Power Corporation, its existence is a result of government legislation providing for the prohibition of imports, i.e., Control of Goods (Importation of Eggs and Poultry Meat) Regulations [SI 120, 1979, 7Th December], 1979. Given the small size of the Botswana poultry market, the closure of the market from imports, combined with the existence of significant economies of scale in the sector, meant that the Government was, in effect, creating the conditions for what is at very least a 'statutory oligopoly', and may be a legal monopoly if one employs the 40% market share threshold as a criteria.

⁶⁸ Other instances are in the beef market dominated by BMC, the energy sector dominated by BPC, Water and in Motor vehicle business where Mercedes and Landrover still dominate. Ibid p. 23

⁶⁹ The Zambia Competition and Consumer Protection Commission has been a positive model for Botswana. The Zambia CCPC was established in 1997 by George Lipimile, the current CEO of COMESA Competition Authority. In May 2017, the International Competition Network (ICN) in conjunction with the World Bank has for the second year running awarded the Zambia Competition and Consumer Protection Commission (CCPC) with the World Bank/ICN Award for its efforts in levelling the playing field through competitive neutrality in the world. See: <https://www.cpc.org.zm/index.php/media-releases/news/155-ccpc-wins-the-2017-world-bank-icn-award-for-competitive-neutrality>

⁷⁰ ibid n 26 above – Creative Business Solutions and Rabbit group bid rigging case for supply of infant formula.

⁷¹ Federal Republic of Nigeria National Assembly see: www.nassnig.org/search/documents/?search=competition&doc_cat=All&chamber_id=All&year_range=&search_type=documents&type=%7B%7Bdocument+type%7D%7D&submit=Go

dominant firms. Such firms may not abuse their dominance by restricting entry into a market, engaging in resale price maintenance, or by withholding or preventing the supply of goods. Interestingly, the Competition Bill will apply to conduct entered into before it comes into effect, although businesses will be granted 18 months from the date of enactment to bring their businesses activities in line with the law. This Bill passed through its first reading in April 23 2008 and then its second reading on November 6, 2008. It was then referred to the joint committees on Establishment and Public Service Matters, Judiciary, Human Rights and Legal Matters and Commerce, which is when this bill stalled. It was followed by another competition bill in 2011⁷² and then another in January 2012.⁷³ However, no discernable progress was made. In July 2015, the Federal Competition Commission (Establishment) Bill, 2015 was given its First Reading,⁷⁴ while most recently, *the Federal Competition and Consumer Protection Bill of 2016*, past the initial hurdle of receiving sufficient votes in the lower House of Representatives, and there is hope that it will be brought into effect by 2018.⁷⁵

These repeated attempts to pass a competition act indicates that there are advocates of competition law in Nigeria. It is increasingly understood that regulators such as the Consumer Empowerment Organization of Nigeria (CEON); the Manufactures Association of Nigeria (MAN); and the Consumer Protection Council (CPC) can only act *ex ante*, by setting prices for example. Competition law is important precisely because it also acts *ex post*, when an infringement to the competition law has occurred. It therefore acts alongside regulated sectors and regulated regimes. In 2008, a survey conducted by CEON⁷⁶ on the state of competition law in the country noted that the ‘protectionist approach’ to trade liberalization that had taken place in the country – such as imposing strict restrictions on import and export of various products - went against the national objective of improving the competitiveness of domestic firms. It argued that rather than improving the level of competition in the markets and bringing down prices of goods and services, privatization in the country had rather resulted in the concentration of economic power in the hands of few big private firms.

The most important sectors of the Nigerian economy are regulated and controlled by major government agencies created by an Act of the National Assembly or Military decrees. These require formal amendments before any other competitor can be allowed into the sector.⁷⁷ As a result, there are few measures in place to prevent anti-competitive agreements amongst these industries that may have formed cartels, nor fines or imprisonment deterrents. Thus, while on the one hand, Nigeria has committed itself to market liberalization in various sectors of the Nigerian government, and moreover the business sector and consumer organizations have recognized the important role of competition law in promoting development goals and fostering a regulatory environment strongly conducive for economic growth. On the other hand, there is still no law to prevent the new undertakings from engaging in cartel-like activities such as price fixing, market division, excessive pricing and even abuse of single or collective dominant positions. In the absence of a competition law regime such conducts are not illegal, no matter how detrimental they are to both consumers and the economy.

4.1 Obstacles to Passing a Competition Law in Nigeria

⁷² A Bill for an Act to Encourage Competition in the Economy by Prohibiting Restrictive Trade Practices, Controlling Monopolies, Concentrations of Economic Power and Prices and for Connected Purposes. January 2011. *Ibid*.

⁷³ A Bill for an Act to Provide for the Establishment of The Nigerian Trade and Competition Commission; and for other Matters Connected Therewith. January 2012, www.nassnig.org/document/download/627

⁷⁴ House Order Paper No 7. 1. Federal Competition Commission (Establishment) Bill, 2015 (HB. 01) (Hon. Yakubu Dogarav - First Reading. www.nassnig.org/document/download/6556

⁷⁵ African Antitrust News and Analysis. June 2017. <https://africanantitrust.com/category/nigeria/>

⁷⁶ National Stakeholders meeting on competition issues ‘Nigeria disadvantaged due to no competition law’. (23rd September 2008).

⁷⁷ Including Nigerian Telecommunications (NITEL), National Electric Power Authority (NEPA) and the Nigerian National Petroleum Corporation (NNPC).

Despite the domestic efforts of the Federal Executives in implementing a competition law for Nigeria, so far the National Assembly have not been able to rise to this commitment to give the Bill accelerated passage. These domestic political economy constraints to competition policy in Nigeria are situated within the context of its transition to a market economy. The sectors mostly affected by the transition are the core sectors that command the highest resources. As a result, the liberalization and privatization agenda has been condemned for various reasons including faulty conceptual and legal framework to poor and non-transparent implementation and outright corruption, leading to what is commonly known as ‘state capture’ in policy circles. Privatisation does not remove corruption. For instance, in Nigeria, the privatised banking sector has been accused of assisting the political office holders for money transfers, holding foreign accounts, and deliberately hoarding information on financial crimes.⁷⁸ The public sector sets out the legislative and regulatory framework for the private sector. Therefore, if the public sector is incapacitated, it is likely this will have a spill over effect on the private sector.

Ironically, resistance to more failed privatization efforts is promoting popular aversion to any market reforms because in the past they are seen to have done more harm than good to normal citizens of Nigeria. This general aversion now serves those more corrupt elements with vested interests in the status quo. Clearly, the lack of sufficient internal will or pressure to implement a competition regime calls for tough advanced advocacy measures and activities. External dynamics still need to be harnessed within Nigeria, to ensure that the competition policy debate is presented as pro-poor, pro small businesses, and anti-unfair business or government excesses in the free market. While an effective competition policy and law is important for economic governance as well as for an economic activity, yet, efforts to institutionalize a culture of competition has tended to target businesses in formal sectors. However, advocacy and stakeholder discussions need to harness consumers, small producers and the pro-poor agenda, domestically and within regional initiatives, to push pro-competition legislation forward in Nigeria.

5. Ethiopia – low domestic competition, low cross border trade

Given the historical absence of integrated consumer protection law in Ethiopia, the revised Competition and Consumer Protection Proclamation of 2013 brought in significant improvements to the earlier 2010 Proclamation. Indeed, in most instances, the current Proclamation is fully in line with international benchmarks. That is, Proclamation No: 813/2013 aims to protect the business community from anti-competitive and unfair market practices, consumers from misleading market conducts, and to establish a system that is conducive for the promotion of competitive free market. It further seeks to ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay, and lastly, to accelerate economic development.⁷⁹

The Proclamation is divided into four parts. The first part sets out general definitions, objectives and scope. The scope of Proclamation No: 813/2013 also provides for extraterritoriality under Article 4(1) which states: This Proclamation shall apply to any commercial activity or transaction in goods or services conducted or having effect within the Federal Democratic Republic of Ethiopia.⁸⁰ Accordingly, an aggrieved party domiciled in Ethiopia may bring proceedings against the trader before the place of the court where the trader resides. On the other hand, the other party may only bring proceedings against the Ethiopian party before the Ethiopian courts. Under Article 4.2 of Proclamation No: 813/2013, the Council of Ministers may specify by regulation those trade activities it deems vital in facilitating economic

⁷⁸ Arowolo, D.E. and Ologunowa, C.S. (2012), “Privatisation in Nigeria: A critical analysis of the virtues and vices”, *International Journal of Development and Sustainability*, Vol. 1 No. 3, pp. 785-796; Arowolo, D. (2010), “The State, Bureaucracy and Corruption in Nigeria”, *Academic Leadership Journal*, Vol. 8 No. 3, pp. 1-8. Nwoye, I. (2007), “Privatisation of Public Enterprises in Nigeria: The Views and Counterviews”, *Nigerian Institute of Management*, Nigeria.

⁷⁹ Proclamation 813/2013 Article 3.

⁸⁰ A commercial activity is an activity conducted by a business person as any person who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code or who dispenses services or who carries on those commercial activities designated as such by law.⁸⁰

development to be exempted from the application of the provisions of Part Two of this Proclamation. In effect, the new provision does not affect the applicability of regulatory functions and administrative measures to be undertaken in accordance with other laws.⁸¹

Part Two of the new Proclamation sets out the rules prohibiting anti-competitive trade practices and merger regulation, which prohibit the abuse of market dominance without specified justifiable reasons, including the maintenance of quality and safety of goods and services; achieving efficiency and competitiveness; any technological, efficiency or other pro-competitive gain resulting from an anti-competitive agreement outweighs that effect; or it involves the setting of minimum resale price. Part Three of Proclamation addresses the protection of consumers and distribution of goods and services. The Proclamation provides that every consumer shall have the right to sufficient and accurate information; choice; protection; compensation. The Ministry and bureaus in collaboration with other appropriate inspection bodies can ban the distribution of goods and services that do not fulfil the standards of health and safety; prohibit hoarding or diverting of goods that have been declared by a public notice issued by the Ministry as scarce in the market.⁸² They may also regulate and fix prices upon approval and by a public notice. Part Four of the Proclamation sets out the necessary institutional framework for implementing and enforcing its provisions. With the enactment of the Proclamation, various organs were created or entrusted with enforcement powers, including the Federal Trade Competition and Consumer Protection Authority (TCCPA), the Federal Trade Competition and Consumer Protection Appellate Tribunal; Regional Consumer Protection Judicial Organs and Appellate Tribunals; the Ministry of Trade (MoT), Regional Trade & Industry Bureaus (RTBs) and Federal and Regional Courts.

In terms of meeting legislative international best practice, the Ethiopian Proclamation No: 813/2013 is to be commended. This was achieved from within the supporting environment that UNCTAD provides in Ethiopia. With over 100 staff members in competition authority, there is now potential to build a pool of resource. In 2015, December, COMESA and UNCTAD jointly sponsored a merger expert from COMESA Secretariat to work with the Ethiopia CA to deal with merger cases and to review their merger guidelines.

Yet, capacity building is, however, situated within a policy structure and system of governance that influences what competition law enforcement can achieve.⁸³ Moreover, establishing a law and implementing a law are very different things. For although Ethiopia has enacted and amended laws that prohibit anti-competitive practices and behaviours, it remains the case that both the level of law enforcement and the level of competition in the country have been very low according to existing studies and empirical evidence.⁸⁴ This research suggests there have been only eight cases related to consumer law, and there have been no cases on anti-competitive agreements entertained by the agencies and other organs. Except for cases of 'hoarding' against which the Ministry of Trade and some of the regional Trade and Industry Bureaus have taken serious measures. That is, there is no evidence that show measures are taken against prevalent anti-competitive business practices.⁸⁵ Yet price fixing is prevalent in Ethiopia, which requires more attention and severer sanctions. The prices of goods and services are usually agreed by the traders

⁸¹ For instance, the proclamation is inapplicable to supervisory activities and measures undertaken in accordance with the Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009, by the Food, Medicine and Health Care Administration Agency.

⁸² Goods are presumed to have been hoarded or diverted contrary to regular commercial practices, where the value of the goods is not less than twenty-five per cent of the capital of the business person and where the goods are not made available for sale within three months of completion of customs formalities, in case of imported goods, or within two months from date of production, in case of locally produced goods.

⁸³ UNCTAD is implementing a competition law enforcement capacity building programme in Ethiopia under funding from the Duchy of Luxembourg.

⁸⁴ Tessema Elias, Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia. *Mizan Law Review*, Vol. 9, No.1 September 2015

⁸⁵ Ibid citing: The Trade Practice Investigation Commission of Ethiopia, *Four Years Performance Report of the Ethiopian Trade Practice Investigation Commission* prepared on 24 September 2008 (2004-2008); Interview with Merkebu Zeleke who was the Director General of both former TPCPA and the present TCCPA, *supra* note 63; Interview with Representative of Regulatory Department, Ministry of Trade on Feb 23/2015 and Interview with Southern Nation, Nationalities and People Region Trade and Industry Bureau on January 28/2015.

including trade associations regardless of the quality of the products and services.⁸⁶ The lack of effective law enforcement contributes to creating an environment in which many of the ongoing anti-competitive practices of established business communities can persist.

In a federalised country as large as Ethiopia, it is of concern that the regional states in Ethiopia do not yet have their independent consumer protection law; nor do they have independent institutional frameworks for implementation. Even though the law envisages the establishment of a regional consumer protection judicial organ, it does not give administrative power to the organ; nor does it give the power to investigate and institute action against violators. The law also envisages the establishment of branches of the federal authority that have not been put into effect until now thereby leaving consumers in the regions outside the ambit of the envisaged protection. The Federal Constitution, under Article 51 (2) & Article 52 (2) (c), empowers both the federal government and the regional states to formulate economic and social development policies in their respective spheres. So while the regional and local levels are critical to the effective enforcement of competition laws, there appears to be no clear mandate given to regional governments to enforce anti-competitive laws. Efforts have also been made to decentralize and devolve of decision-making, accountability and revenue generation to the regional states and local level administrations.⁸⁷ However, this is not the case for competition or consumer laws. Thus, the lack of effective enforcement of competition laws at the national level is related to the lack of decentralization of consumer protection enforcement.⁸⁸

6. Enforcing Competition Law in Africa: Harnessing Regional Dynamics

Free-trade areas and custom union plans typically declare that certain anti-competitive practices are incompatible with the proper functioning of the agreement or contrary to its free-trade objectives.⁸⁹ These treaty expressions obviously range from ‘very soft’ to ‘very hard’ law. An example of such a ‘soft’ provision recognizes that certain anti-competitive practices will undermine the objectives of the RTA members to the treaty, and that the members should make (best) efforts to address anti-competitive practices. While this approach may or may not have political effects on the behaviour of the members and their laws, it does not have legal effects. Other customs unions and common market plans contain far stronger expressions that establish an independent regional law and then institutional regional power to enforce it. A ‘mixed’ harmonization model can be identified in some of the newer free-trade area plans (north–south in particular), where the trend is to substitute the role of an independent regional law with provisions on the criteria and performance of the domestic laws. In some cases, this explicitly requires the establishment of national competition laws that can treat cross-border anti-competitive practices according to certain substantive and institutional performance standards.

In Africa, a diverse range of regional arrangements exist including the best practice provisions under the Southern African Customs Union (SACU), the Southern African Development Community (SADC), the stronger regional framework based on the EU competition model under the Common Market for Eastern and Southern Africa (COMESA) and the Economic Community of West African States (ECOWAS). A point to note, there are developments towards a Continental Free Trade Area for Africa and the Tripartite Agreement linking SADC, COMESA and EAC. These two initiatives have competition and consumer protection components. Nevertheless, any frameworks developed will depend on the progress so far made

⁸⁶ Roberto Zavatta and Samuel Feyisa, *Baseline Survey on Competition and Market in Ethiopia*, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Associations, 2009; Fikremarkos Merso, Imeru Tamirat Yigezu and Others, *Review of the Legal and Institutional Framework for Market Competition in Ethiopia*, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Association, 2009;

⁸⁷ Fiscal federalism in Ethiopia has a grant-sharing formula, which operates through the Regional Council and the House of Federation allocates resources taking into account considerations of equity and rights. AFDB/ UNDP African Economic Outlook, Ethiopia 2015, p.13 also available at, www.africaneconomicoutlook.org.

⁸⁸ T. Elias. Op cit.

⁸⁹ K Dawar, JH Mathis. Is there Potential for Competition in ECOWAS? Competition and Regional Agreements, Ensuring Development Gains. UNCTAD. Geneva, 2008.

by national competition authorities and therefore national enforcement efforts are key to this process. Nevertheless, national enforcement efforts have the potential to be buttressed by regional initiatives.

6.1 Nigeria and Competition Policy and Law Enforcement in ECOWAS

The Economic Community of West African States, ECOWAS, is a sub-regional economic organization whose objective is to integrate the economies of its member states to promote the economic development of the region. Although ECOWAS was founded as early as 1975, it was more than thirty years later, in 2008, that legislators created a regional competition framework that aims at regulating competition within the region. The Preamble to the Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS,⁹⁰ notes, *inter alia*, that the High Contracting Parties are “desirous of endowing ECOWAS with competition rules that are consistent with international standards in order to promote fairness in trade and effective liberalization of trade.” Competition law therefore has become an explicit element in the process of creating a common market in West Africa, and could potentially auger well for promoting competition law enforcement in Nigeria.

The objectives and purposes of the Supplementary Act Adopting Community Competition Rules pursuant to Article 3, include promoting competition at the regional level, prohibiting any anti-competitive business conduct that prevents, restricts or distorts competition at the regional level and ensuring consumer welfare. The Supplementary Act is applicable to agreements, practices, mergers and distortions caused by Member States which are likely to have an effect on trade *within* ECOWAS, and concern notably acts directly affecting regional trade and investment flows and/or conduct that may not be eliminated other than within the framework of regional cooperation.⁹¹ Article 7 also prohibits every merger, takeover, joint venture, or other acquisition or business combination where the resultant market share in the ECOWAS Common Market, results in abuse of dominant market position resulting in a substantial reduction of competition.

The scope of the Supplementary Act is ambitious enough to cover both subsidies and public enterprises. Under Article 8, except as otherwise provided in the Supplementary Act, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain enterprises or the production of certain goods shall, in so far as it affects trade between Member States, also be incompatible with the ECOWAS Common Market. While Member States may neither enact nor maintain any measure contrary to the rules contained in the Supplementary Act. Moreover, enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are also subject to these rules, but only in so far as the application of rules does not obstruct the *de facto* or *de jure* performance of their assigned tasks. Significantly, the Supplementary Act also envisages that *any person* or Member State who has suffered losses as a result of any anti-competitive practice prohibited under this Supplementary Act may, upon application to the ECOWAS Authority,⁹² receive compensation for such losses.⁹³

The ECOWAS Competition Authority has the mandate, *inter alia*, to carry out on its own initiative or at the request of private persons or government officials from the Member States or of the Community Court of Justice, in relation to the conduct of business in the Common Market to determine whether any enterprise is engaging in business practices in contravention of the Supplementary Act adopting the

⁹⁰ The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS. Signed in Abuja 19th December 2008 at the Thirty Fifth Ordinary Session Of The Authority Of Heads Of State And Government.

⁹¹ Article 4. The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS.

⁹² The Supplementary Act A/SA.2/06/08 On The Establishment, Function Of The Regional Competition Authority For ECOWAS. Signed in Abuja 19 December 2008 at the Thirty-Fifth Ordinary Session Of The Authority Of Heads Of State And Government.

⁹³ Article 10: Compensation For Victims Of Anti-Competitive Practices. The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS.

Common Competition Rules. It may also co-operate with national and regional competition agencies in taking measures necessary to ensure implementation of the Supplementary Act.⁹⁴ The ECOWAS Competition Authority is endowed with the power to prohibit or terminate a contract that has the effect of reducing competition.⁹⁵ With regard to State Aid, a person or Member State that has suffered losses as a result of a practice prohibited under the ECOWAS competition rules, may apply to the ECOWAS Competition Authority for compensation, where warranted.⁹⁶

For those wishing to promote competition within the ECOWAS Common Market, the biggest limitation to implementing and enforcing the regional rules set out under the Supplementary Act is that enforcement is governed by the rules of civil procedure in each Member State. It is incumbent upon each Member State to appoint a competent national authority to receive or implement the decisions of the ECOWAS Competition Authority and those of the Community Court of Justice.⁹⁷ Thus, despite the 2008 Supplementary Acts and their commitments by the Heads of State of the Members, the ECOWAS Competition Regime is not fully enforced, although possibility of establishing the Competition Authority in Gabon has been raised.⁹⁸

Nigeria is an ECOWAS Member without a single competition law with a complementary competition authority to implement and enforce rules prohibiting anti-competitive business practices domestically. And therefore, its domestic businesses have not been exposed to domestic or regional competition rules, despite the fact that Nigeria is now the largest economy in Africa and Nigerian business activities take place in other countries and regions where competition policy and law is being enforced domestically – such as in Botswana, Zambia and South Africa, or regionally - through COMESA. In the four years since the COMESA Competition Commission became operational in 2013, it has developed into an active regional competition authority, successfully enforcing regional competition regulations in both mergers and acquisitions and anti-competitive business practices with a cross border effect.⁹⁹ Nigerian businesses operating within COMESA are therefore already subject to these regulations.

The Dangote Group, for example, is headquartered in Nigeria but has a strategy of globalisation and is already one of the largest industrial conglomerates in Africa, valued at \$15.4 billion in 2016.¹⁰⁰ A significant element of this business conglomerate is Dangote Cement, the African continent's biggest cement maker. It was reported that Dangote had raised the price of its cement by 44% in Nigeria,¹⁰¹ yet absent a competition enforcer, no investigation could take place in Nigeria. Nevertheless, Dangote Cement is the largest cement production company in Africa, with a market capitalization of almost \$14 billion on the Nigeria Stock Exchange, and subsidiaries in Benin, Cameroon, Ghana, Nigeria, South Africa and Zambia.¹⁰² Foreign competitors have shown concern, in Zambia for example, Dangote Industries Zambia Limited states that price for its cement products is 30 percent stronger than regular Zambian cement.¹⁰³ A

⁹⁴ Article 3. The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS.

⁹⁵ Article 4. The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS.

⁹⁶ Article 10. The Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS.

⁹⁷ Article 11. Modalities For Enforcement Of Decisions Taken By The Authority And The Community Court Of Justice

⁹⁸ Clifford Chance. Insights and Updates in Africa 2017.

⁹⁹ The COMESA Commission became operational on 14th January, 2013, under the leadership of Mr George Lipimile, CEO, and is based in Lilongwe, Malawi. The Commission enjoys the status of international legal personality and has in the territory of each Member State, the legal capacity required for the performance of its functions under the Treaty. Since the Regulations are now operational, it is the requirement that all cross-border transactions be notified for the necessary approval of the Commission: www.comesacompetition.org/?page_id=335

¹⁰⁰ Forbes 2016 quoted in www.thisdaylive.com/index.php/2016/03/09/dangote-group-controls-43-of-nigerian-stock-market/

¹⁰¹ <https://africanantitrust.com/2016/09/19/dangote-price-increase-could-be-sign-of-collusion-or-dominance-dangote-in-nigeria/>

¹⁰² <http://venturesafrica.com/10-african-companies-going-global-in-2013/>

¹⁰³ Dangote's quoted price was between 58,2 kwacha (US\$6) and 55,1 kwacha (US\$5,6) per 50 kilogramme bag of cement, inclusive of Value Added Tax. The national average price according to the Central Statistics Office of

competition investigation would serve to determine whether these prices differences are due to competitive or anti-competitive behaviour.

Dangote's business practices, along with other Nigerian businesses abroad, must therefore operate according to these jurisdictions competition laws, including cartel control, abuse of dominance and merger regulation. Otherwise they will be investigated by the relevant competition authorities implementing their competition rules and remedies. This necessarily exposes Nigerian business practices to other principles of competition law, regardless of the lack of operational law in either Nigeria or ECOWAS. In such a situation, it could be that Nigerian business interests learn the culture and value of competition exogenously, and in so doing become part of the lobby for an effective domestic competition law, in line with Africa wide developments. It must nevertheless be asked whether this is one of the more indirect and uncertain strategies to promote competition law enforcement in Nigeria and among Nigerian businesses.

6.2 Ethiopia and COMESA Competition Law Enforcement

Ethiopia is a member of the Common Market for East and Southern Africa (COMESA) and the Intergovernmental Authority on Development (IGAD). The country has signed all regional integration protocols, including the COMESA Free Trade Area Protocol, and in 2014 it submitted its accession instruments to the COMESA Free Trade Area. The COMESA Treaty for Competition Regulation has provided Ethiopian consumers' protection in cross-border transactions since it was ratified in 2004. For where a business's conduct directly affects regional trading, the Regulations will apply to that business regardless of their ownership or control, including government-owned businesses and foreign-owned businesses.

However, given that Ethiopia is not perceived to be actively regionalizing or internationalising. COMESA has not been able to exert much competitive dynamic. For regional law will not typically apply to businesses that are trading wholly within only one-member country or not trading within any COMESA Member State. Ethiopia's trading across borders, trade diversification and trade freedom indices are among the lowest in sub-Saharan Africa. The World Bank's report *Doing Business* ranked Ethiopia as 166th out of 189 in terms of cross-border trading. Ethiopia continues to negotiate an Economic Partnership Agreement (EPA) with the European Union, and its negotiations to join the World Trade Organization are also ongoing. These challenges notwithstanding, UNCTAD is implementing a 3-year capacity building project funded by the Government of Luxembourg. With over 100 staff members in competition authority, there is potential to build a pool of resources. 2015 December, COMESA and UNCTAD jointly sponsored a merger expert from COMESA Secretariat to work with the Ethiopia CA to deal with merger cases and to review their merger guidelines.

6.3 Botswana, SACU and SADC Competition Law and Policy Enforcement

The SACU Treaty, to which Botswana is a party, includes a two-sentence Article 40 which states that the members shall have competition policies (a treaty obligation) and that they shall cooperate in the enforcement of competition laws and regulations. While this provision does not establish an independent regional law, it does allow for some additional development by protocol or otherwise to outline the characteristics of Member State cooperation. And while it does not allow for the establishment of a regional authority, it does not exclude the possibility of Secretariat assistance to facilitate cooperation. In 2005, UNCTAD worked with SACU to develop instruments to operationalize Articles 40. A cooperation

Zambia was 81,58 kwacha (US\$8,6) for the same quantity See: The Business Reporter: Firms unnerved by imminent competition . . . as Dangote Cement looms on the horizon. September 27, 2015. Available at: www.sundaymail.co.zw/firms-unnerved-by-imminent-competition-as-dangote-cement-looms-on-the-horizon/

agreement was proposed, but implementation has not been sanctioned by member states. Some texts say that work may have guided the current developments.

The SADC competition authority has developed best endeavour provisions for its members to follow. These include model templates/guidelines for designing regulation for merger control, abuse of dominance, anti-cartel enforcement, consumer advocacy, leniency policy, for example. However, rather than following SADC's lead, Botswana's competition regime has, alongside the more established frameworks in Zambia and South Africa, served as a positive model of rapid implementation - particularly for other small African countries' leaders and competition authority officials internationally. Botswana highlights that it is possible, with good domestic leadership and sound international expertise and capacity building, to harness internal forces to push competition law enforcement rapidly and in line with international best practice examples.

7. Concluding Remarks

This paper has highlighted the differences in the progress three African countries have made in implementing competition policy and law over the last 15 years. A leading light, Botswana has successfully galvanised both social and political will domestically to push forward a strong and enforceable competition law, and has evidently made great strides in introducing competitive dynamic forces to the Botswana economy. While this process has been largely internal, it has benefited from significant buttressing from external forces such as UNCTAD, the African Union, African Competition Forum (ACF) and international expertise. Botswana therefore offers a positive example to its neighbours and internationally of what can be achieved in a small landlocked country, dominated by a more developed neighbour, yet determined to pursue good economic governance above crony capitalism.

The past fifteen years in Nigeria has resulted in little more than stillborn attempts at passing a Competition Bill, and as a result privatisation has proceeded without the acknowledged necessary support of a competition law. An absence of competition law enforcement has contributed to economic mismanagement, inefficiencies and a safe-haven for anti-competitive practices, particularly cartels and blatant corruption. This, in turn, has somewhat perversely contributed to popular suspicion of further market reforms, including competition law. In such a situation of disenchantment in the benefits of market liberalisation in Nigeria, further attention should be turned to harnessing exogenous factors that can help to push competition advocacy domestically. As such, it is important that economic stakeholders and Nigerian businesses operating abroad understand that they will be subject to competition laws as regards their external operations, and the benefits that this will afford them vis-à-vis other firms' anticompetitive behaviour. This should alert key business figures as to the positive contribution a domestic competition law can make in harmonising these principles and in protecting Nigerian business interests from abuse.

A third variant – Ethiopia – has adopted international best practice in competition and consumer protection laws and policies, yet implementation and enforcement has not been a natural consequence of having the law. Moreover, the lack of cross border trading activity does not expose Ethiopia to the comprehensive regional competition framework presented under the COMESA. To date it could be seen that Ethiopian political and social leaders are not active enough in promoting competition law and policy domestically. As a result, external support through international development aid and expertise, while available, is still not sufficient. As a result, its comprehensive competition law stands as a paper tiger until there is enough domestic will to enforce it and reap the benefits it can offer.

Given the thrust towards integration across Africa, it is to be hoped that the current wave of pan-African regionalisation can be further harnessed domestically to promote competition law enforcement in the more recalcitrant countries of Africa. There are increasingly more African countries that have successfully established, implemented and enforced competition laws based on international best practice, harnessing

external forces to buttress reforms where necessary. More countries such as Zambia, South Africa and now Botswana, can and do serve as diverse positive examples of the realm of the possible.